Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revisions to Cable Television Rate Regulations	)	MB Docket No. 02-144
	)	
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266
	)	
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 93-215
	)	
Adoption of a Uniform Accounting System for the Provision of Regulated Cable Service	)	CS Docket No. 94-28
	)	
Cable Pricing Flexibility	)	CS Docket No. 96-157

REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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INTRODUCTION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.

Congress decided more than six years ago that cable operators should be free of rate regulation for all but the basic tier of service and equipment. Congress chose competition over regulation for achieving the ultimate goal of reasonable rates and increased consumer choice. Since that time, competitive choices for multichannel video programming have flourished. DBS subscribership has continued its steady upward march. More than twenty million customers now turn to someone other than their local cable operator to obtain multichannel video programming.

Unlike cable, DBS's rates are not regulated. DBS is not required to force customers to buy a basic tier of service before they can obtain any other video offerings nor must it charge rates uniformly throughout a given geographic region. Satellite providers are not franchised at the local level and do not pay franchise fees. DBS is not compelled to spend the considerable time, energy and money necessary to fill out various forms and navigate the shoals of the local rate review process. DBS operators simply can go out every day and try to gain new subscribers.

The comments of the "Local Government Coalition"[1] ("LGC" or "Coalition") choose to ignore this reality. They instead seek to justify new regulatory burdens on cable, which would place operators at an even greater competitive disadvantage by tying cable operators up in regulatory knots and by increasing the cost of regulation.

The Commission should avoid any temptation to enlist in this effort. The FCC has a decade's experience in regulating cable rates and overseeing the explosive growth in multichannel competitors to cable. Based on that experience, the Commission's Notice in this proceeding appropriately focuses on how best to modify the local rate review process to take these changed circumstances into account in regulating the basic tier.

Any modifications to the rate rules should be guided by the overriding interest in streamlining and simplifying the rate regulatory process while insuring the goals Congress established for it are maintained. In so doing, the Commission can appropriately lower the costs of regulation – costs that are borne by cable customers, operators and regulatory authorities. To ensure that the rate regulation process proceeds smoothly, the Commission must maintain a strong role in overseeing local franchising authority ("LFA") basic rate reviews and not cede more authority to cities to create their own ad hoc rate regulation schemes.

DISCUSSION

I. THE COMMISSION SHOULD MAINTAIN ITS EXISTING BASIC RATE RULES

The LGC unleashes a vitriolic attack on the FCC and local cable operators, accusing the agency and operators of complicity in evading rate regulation.[2] Much of LGC's attack is unsubstantiated. The fact remains that rate regulation of the basic tier is in most instances non-controversial – as it should be. Nevertheless, there are cases in which operators and cities disagree over interpretation of the rate rules. LGC's proposals would do nothing to smooth the rate review processes in those instances. Instead, they would prolong these conflicts and increase costs to operators of basic rate reviews. As described below, their proposals are without merit.

A. The Commission Should Not Adopt the Cities' Cost-Based Rate Approach

As NCTA's initial comments explained and as the Notice in this proceeding acknowledges, there are numerous costs that would result from implementing wholesale changes to basic tier rate regulation. Any attempt to recalibrate the basic rate methodology inevitably causes its own problems and distortions. The proposals of LGC and the New Jersey Ratepayer Advocate show why.

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1 The "Local Government Coalition" includes the National Association of Telecommunications Officers and Advisors, The National League of Cities, and the Miami Valley Cable Council.

2 See, e.g., LGC Comments at 13. ("Not only has the Commission taken no discernible steps to stop evasions: on the contrary, in many cases the Commission has taken steps that positively encourage evasions."); id. at 22-23 (proposing that the FCC "[w]ork … with franchising authorities to identify areas where evasions may be occurring and tak[e] a closer look at practices that may be used to evade the effect of the Commission's rules").

LGC argues that "actual competitive rates" should be used to determine rates in areas where operators' rates remain regulated.[3] LGC's proposal would require that

> if a cable operator charges a given per-channel rate in one area where it faces actual competition from a second wireline multichannel video provider, there is a rebuttable presumption that a franchising authority can set the same per-channel rate in another area where the operator does not face such actual competition. The operator can overcome this presumption by making a quantifiable and verifiable showing of the cost differences between the two areas, using those cost differences to adjust the rate. The burden should be on the operator to show that such an adjustment is necessary and that its amount is fully supported by verifiable costs.[4]

This proposal suffers from numerous flaws. Most fundamentally, LGC provides no evidence to support its proposition that only wireline MVPDs provide "actual competition" to cable. Regardless, the survey upon which the FCC's "competitive differential" was calculated was heavily weighted toward rates charged by municipal and other overbuilders. Thus, these rates are already incorporated into the basic rate formula.

The notion that ten years later, per-channel basic tier rates might differ from one system to the next is hardly surprising. Even per-channel rates that might have been identical in 1993 at the start of rate regulation may have diverged due to a variety of differences in external costs. For example, some basic tier channels may have no programming costs, while operators in nearby systems may choose to include license-fee programming on a basic tier channel. Certified LFAs have evaluated basic cost increases, highly circumscribed in any event, every year since the inception of rate regulation. The fact that per-channel basic rates might differ from one community to the next therefore demonstrates nothing about the "competitiveness" of the operator's rates in either community.

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3 LGC Comments at 19.

4 Id. at 21.

Aside from the significant disruptions that overhauling basic rate regulation would cause all concerned, the Coalition's proposal represents poor policy. To the extent an operator in one community were required to charge identical rates to all its adjoining communities, it would act as a serious deterrent to lower rates in the first community. This perverse outcome of the new regulatory scheme would make the basic customer worse off.

Another flawed feature of LGC's proposal – shared by the New Jersey Rate Payer Advocate's proposal[5] – is the requirement that operators make a cost showing to justify their rates. The Commission from the outset rejected a cost-based rate methodology. Among other things, it acknowledged that "[w]hile there are some advantages to cost-of-service regulation, there are significant disadvantages…. Cost-of-service regulation also imposes heavy burdens upon regulators and regulatees because of the significant administrative and compliance costs associated with this regulatory model."[6] These concerns are as real today as they were in 1993.

The New Jersey Board of Public Utilities understands the folly of attempting to reinvent basic rate regulation at this juncture. It concedes that "if a 'per channel' value approach would be maintained, reprising a new benchmark system is probably the best approach to achieve proper values. <u>But it would also be the most burdensome and time-consuming method with no known advantage to subscribers or franchising authorities</u>. In light of the limited nature of the BST rate regulation, the growth and maturity of cable programming services, and the deregulation of CPST, the effort wouldn't produce material changes."[7] The NJ BPU admits that "this is not a worthwhile endeavor…."[8] We agree.

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5 Comments of the New Jersey Division of the Ratepayer Advocate at 5.

6 <u>Report and Order and Further Notice of Proposed Rulemaking</u>, 8 FCC Rcd. 5631, 5755 (1993).

7 Comments of the State of New Jersey, Board of Public Utilities, Office of Cable Television (hereinafter "NJ BPU Comments")(emphasis supplied). The N.J. BPU also argues that because of the complexities of recalculating rates, the FCC should no longer permit operators to increase basic rates to reflect a per channel

B. Operators Should Not Be Forced to Contribute More to LFAs to Fund Their Rate Regulation Efforts

Given the increased level of regulatory intervention that LGC advocates, it is no surprise that much of their pleading looks for ways to finance their additional activities. Cable operators paid LFAs more than $2 billion in 2001 – which represents up to five percent of revenues derived from providing cable service. That payment was designed to offset the costs of regulating cable – and then some. Now LGC hunts for additional sources of funding. It claims that local governments should be able to charge cable operators again, "over and above their franchise fees," to fund rate reviews.[9] Apparently lost on LGC is the irony that increasing cable's costs to subsidize local governments' (and their outside consultants') rate regulation efforts would inevitably lead to increased pressure on cable rates.

Even if there were any logic to the proposal, it runs afoul of the law. Any payments imposed to cover the costs of rate regulation by the LFA would apply uniquely to cable operators. As such, they would be considered a "franchise fee" and subject to the 5 percent cap.[10]

C. The FCC Should Not Modify the "Use or Lose" Approach

Under existing FCC rules, cable operators are permitted to charge less than the maximum permitted rate and do not lose the ability to make up the difference in future rate filings. The

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adjustment factor. For the reasons described infra at 17, we do not agree that such an adjustment would be unduly complex.

8 Id.

9 LGC Comments at 26.

10 A "franchise fee' includes "any tax, fee, or assessment of any kind imposed by a franchising authority or other government entity on a cable operator or cable subscriber, or both, solely because of their status as such." 47 U.S.C. Sec. 542(g)(1).

FCC abolished its previous rule, which required operators to "use or lose" their rate adjustment, determining it would not serve the public interest.[11]

The Massachusetts Department of Telecommunications and Energy, Cable Television Division ("Mass. Cable Division") suggests that the FCC return to the "use or lose" approach.[12] But changing the rules in mid-course could have serious negative consequences to basic customers. Operators that may have forgone legitimate rate adjustments might feel compelled to increase rates. Rule changes that might encourage this type of rate shock should be avoided.

II. THE FCC SHOULD NOT ADOPT PUNITIVE MEASURES

A. The Commission Should Not Impose Fines and Forfeitures For Rate Disputes

LGC complains that the Commission has not taken measures that "would, as a practical matter, require cable operators to comply with local rate orders."[13] LGC recommends that the FCC "clearly restate and reaffirm the principle that a cable operator must comply with local rate orders unless and until those orders are stayed or reversed by the Commission."[14] And it proposes that the Commission "establish straightforward fines or forfeitures that localities can use to enforce the Commission's rate rules, address operators' refusal to produce required information, and deal with refusals to comply with local rate orders. In particular, where operators fail to respond to information requests or comply with rate orders, additional fines should be imposed for each day's delay."[15]

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[11] Implementation of Sections of the Cable Television and Consumer Protection Act, 11 FCC Rcd. 388, 392 (1995) (eliminating "use or lose" requirement "in order that operators not feel compelled to make rate filings or increase rates when they otherwise would not …").

[12] Mass. Cable Division Comments at 7-9.

[13] LGC Comments at 15.

[14] Id. at 18.

[15] Id.

There is no need for the FCC to adopt these measures. Local authorities already have the tools to obtain compliance with their rate orders. From the beginning of rate regulation, the FCC held that "[a] cable system could be liable for violation of a rate decision specifically directed at the cable operator by a franchising authority. For example, if a cable operator did not comply with a refund order by the franchising authority, the franchising authority could order monetary forfeitures if it possesses such power under local law."[16] Local authorities apparently do adopt enforcement mechanisms.[17] But the FCC should not make that a federally-conferred right.

The Commission's first rate order rejected the notion of generally imposing fines and forfeitures for miscalculating basic rates, finding that "[a] determination that either existing rates or a request for an increase is unreasonable is not a violation of law and does not warrant punitive action by a franchising authority."[18] This determination is wholly consistent with Congress' intent.[19]

The FCC should not alter that sound conclusion. Fines and forfeitures are not needed to protect basic customers. If the operator's rate calculation is determined to be erroneous, customers will be made whole in the true-up process.

Adopting punitive measures would introduce an unnecessary, counterproductive flash point in the basic rate process. As the Commission is well aware, perfect decision-making is not always found in local rate review and, as a result, Congress and the FCC deemed appeals to the

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16 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631, 5728 n. 382 (1993).

17 LGC's Comments confirm that local communities do apply fines and forfeitures in certain circumstances. LGC Comments at 23.

18 8 FCC Rcd. at 5728.

19 H. Rep. No. 628, 102d Cong. 2d. Sess. 88 (determining in the context of CPS rates that "[a] finding that rates are unreasonable is not to be deemed violation of law subject to the penalties and forfeitures of the Communications Act.")

FCC from basic rate decisions necessary. LFAs may simply choose to ignore the FCC's rate rules, instead summarily dismissing operators' rate filing because they do not like the rates even though they are fully justified under the rules.[20] Providing LFAs the right to impose increasing fines and forfeitures based on a local authority's rate decision will exacerbate these problems. It would pressure operators to file stays and appeals at the FCC in order to avoid punitive actions, needlessly increasing the volume of work required by cable operators, LFAs and the FCC.

B. Sanctions for Failing to Respond to Information Requests are Unwarranted

LGC's proposal to impose fines and forfeitures for failure to respond to information requests[21] is equally baseless. The Commission is aware that "the mere fact that a franchising authority requests information does not make the information relevant."[22] Indeed, some cities abuse the rate review process by burying operators in voluminous requests for irrelevant bits of information.[23] Accordingly, there is no reason to adopt the LGC's suggestion to fine operators for failing to respond to information requests.

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[20] See, e.g., Westmarc Cable Holding, Inc., 14 FCC Rcd. 2110 (1999) (granting appeal where "the City's denial of the proposed rate increase on the basis that there should be rate comparability with other communities is not adequate, for the City's order fails to explain why the operator's rates are unreasonable pursuant to the Commission's rules governing rates."); Heritage Cablevision, Inc., 13 FCC Rcd. 12014 (1998) (finding insufficient city's rate determination that failed to "[a]ffirmatively demonstrate why [the operator's] proposed rate is unreasonable but merely states that additional information is necessary and that denial is in the best interest of the local citizens."); Time Warner Cable, 13 FCC Rcd. 6593 (1998) (city denies rate increase of 13 cents, overruling staff recommendation to approve increase, arguing that "the citizens of this County… cannot afford a price increase at this time and same is not justified at this time and the pace of equipment and modernization and extension of service to rural areas has been woefully unsatisfactory and that the provision of community access as to content and content review and the technical quality has not been satisfactory."); Falcon Cable, 13 FCC Rcd. 6590 (1998) (rejecting basic rate increase, even after consultants had found the rate submissions to be in compliance, "because Falcon allegedly failed to meet the Commission's customer service obligations."); TCI TKR of Georgia, Inc., 16 FCC Rcd. 14,551 (2001) (denying rate increase because "the city council does not feel that based on the quality of the services provided to the citizens of Bainbridge by AT&T Broadband this increase is justified.").

[21] LEC Comments at 18.

[22] TCI of Richardson, 14 FCC Rcd. 11700, 11707 (1999).

[23] Appendix A is one example of a typical abusive request for information. The request consists of 8 single-spaced pages of questions relating, in most instances only tangentially, to the operator's Forms 1205 and 1240 filings.

III. REGULATION OF NEWLY-REGULATED RATES SHOULD BE SIMPLIFIED

The Notice acknowledges that the current method for determining initial rates for previously unregulated systems presents serious concerns.[24] For that reason, NCTA endorsed the Commission's suggestion that newly-certified LFAs should be limited to reviewing the most recent rate increase.

This approach is superior to the Mass. Cable Division proposal. The Mass. Cable Division suggests two alternatives: either newly-certified regulators could compare the operator's rates with those approved in regulated communities with similar characteristics, or average all regulated rates in a region.[25] Either alternative suffers from the flaw of ignoring the benchmark variables, and the changes over time (described supra), that may lead systems to have very different rates. Thus, even if both systems had been regulated over the same period of time, there is no reason to assume they would charge the same maximum permitted rate today.

Moreover, nearly a decade into rate regulation, it is only fair to give operators the certainty that their rates are not subject to reopening. Operators should be entitled to rely on an LFA's acquiescence to its basic rates over the years without subjecting its current rate to review pursuant to an entirely new methodology.

See, e.g., Appendix A at 5 ("explain the decrease in total calls from 2,189,067 in the prior filing to 1,615,135 in the instant filing;"); id. ("Please provide copies of all contractor invoices for the year ended December 31, 2001"); id. at 7 ("Indicate the number of hours of vacation taken by install employee for the year 2001…. And indicate the number of hours of personal leave taken by install employee for the year 2001….").

[24] Notice of Proposed Rulemaking at ¶ 27.

[25] Mass. Cable Division at 4.

IV. THE COMMISSION SHOULD REJECT LGC'S ATTEMPTS TO REWRITE THE EFFECTIVE COMPETITION PROVISIONS

The Local Government Coalition's comments repeat their familiar refrain that only wireline competition represents "real" competition.[26] And they argue that DBS does not really represent competition since it allegedly fails to provide price competition to cable. They thus argue that a "[l]oophole has been opened by the recent wave of industry filings claiming that DBS alone provides sufficient 'effective competition' to justify abandoning rate regulation."[27]

This argument is completely misguided. That cable and DBS compete is beyond dispute. As Chairman Powell recently stated, "[t]he record shows that EchoStar and DirecTV compete vigorously, not only with cable, but with each other…. Neither operator is failing in its efforts to compete against cable. DBS subscriber growth rates are 2.5 times larger than those of cable. Cable is attempting to respond to the DBS threat by increasing channel capacity and adding new services for consumers."[28] That nearly all households in the United States can choose among three multichannel video providers is similarly incontrovertible. Nearly 20 million people have chosen DBS over cable. DBS offers local broadcast signals in dozens of markets across the country. And in many instances DBS prices exceed those charged by cable, making cable the lower-priced choice.

LGC's argument is flawed as a legal matter as well. For purposes of determining whether "effective competition" exists, Congress has included competition from unaffiliated "multichannel video programming distributors" – a term that Congress defined to include DBS

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26 LGC Comments at 8.

27 Id. at 28.

28 Application of EchoStar Communications Corporation; General Motors Corporation and Hughes Electronics Corporation; see also GAO: Issues in Providing Cable and Satellite Television Services (November 2002) (finding that DBS provides competition to cable). See also Comments of the New Jersey Division of the

providers.[29] Thus, there is no basis for adopting LGC's proposal that "the Commission should rescind the rule that considers DBS to constitute a competitive alternative everywhere, and decline to find effective competition based solely on DBS."[30]

LGC also argues that DBS should not satisfy the "comparable programming" prong of the effective competition test unless "the programming offered is in fact comparable in content to the basic cable tier, and that any data used in this showing has been verified by the cable operator."[31] The Commission is well aware that comparability need not mean identical content. DBS offers hundreds of programming channels to customers. The Commission should relieve operators of the need to show DBS programming comparability, as suggested in NCTA's filing, rather than increase unnecessary burdens by adopting the Coalition's "verification" proposal.

NCTA's initial comments demonstrated why the Commission should presume that cable operators face effective competition in any state where DBS penetration exceeds 15 percent.[32] The burden would then be on LFAs to demonstrate that effective competition is not present in its franchise area. LGC, however, suggests that the existing procedure should be made even more burdensome by requiring operators to first file their effective competition petitions with LFAs,

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Ratepayer Advocate at 7 ("there is anecdotal evidence, as well, that satellite services are producing cost-constraining effects on cable rates").

29 47 U.S.C. § 523(13) ("The term 'multichannel video programming distributor' means a person such as, but not limited to, … a direct broadcast satellite service…who makes available for purchase, by subscribers or customers, multiple channels of video programming.")

30 LGC Comments at 36. LGC's proposal (at id.) that the FCC "revise its rules to ensure that they yield a determination of effective competition only where two providers actually offer service to the same subscriber" is also at odds with the statute. The "competing provider" and "municipal overbuild" subparts of Section 623 provide that programming must be offered "to at least 50 percent of the households in the franchise area." The Act does not require each subscriber to have a choice of two providers in order for "effective competition" to be present.

31 Id. at 36.

32 NCTA Comments at 29.

who then would submit the petition "with its comments, to the FCC."[33] Cities should not be permitted to further delay a finding of competition by erecting new procedural roadblocks to making that showing.

LGC's list of supposed problems with cities obtaining evidence to demonstrate the absence of effective competition are easily remedied. For example, LGC claims that "it is difficult for local communities to investigate the weaknesses in the industry's DBS filings, because they do not have access to the underlying data."[34] The solution to that problem is simply for the FCC to make clear that SkyTrends and other data relating to the LFA's community can be made available to an LFA participating in the effective competition proceeding.[35] LGC also complains about supposedly inconsistent zip code data.[36] NCTA's initial filing addressed some of the cities' concerns by providing a means to agree on the identification zip codes located within a franchise area to avoid protracted disputes.[37]

As to LEC competition, the LGC filing again takes issue with Congress' determination not to include a penetration test in amending Section 623.[38] The Coalition claims that another alleged "[a]buse of the 'effective competition' notion occurs when a cable operator relies on the potential for *future* competition as a way of escaping rate regulation *now*."[39] The cities' main issue appears to be that LECs are not required to overbuild an entire franchise area before effective competition can be found. Here, too, Congress determined otherwise. It did not

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[33] LGC Comments at 36-37

[34] Id. at 30. Of course, the cable operator and the LFA are in the same posture in regards to collecting data about DBS; additionally the LFA has the franchise fee to fund its research efforts.

[35] Cox Comments at 21.

[36] LGC Comments at 30-31.

[37] NCTA Comments at 31.

[38] LGC Comments at 32. See also Everest Comments at 4.

require service to the entire franchise area or that any particular percentage of customers take the service – merely that a LEC "offers" service in the franchise area.[40] Thus, LGC's proposed modification is at odds with the Act and should not be adopted.[41]

V. THE COMMISSION SHOULD NOT RESTRICT OPERATORS' ABILITY TO PRICE COMPETE

LGC asks "both for the sake of consumers, whom it must protect under the Cable Act, and for the sake of protecting competition itself from suppression through anticompetitive practices, the Commission needs to make explicit rules to prohibit practices by incumbents that stifle competition, covering single-family residential subscribers as well as MDUs."[42] Among these alleged anticompetitive practices is the offering of price discounts.[43] Why LFAs would seek to deny consumers one of the benefits of competition – vigorous price competition for their business – is nowhere explained.[44] Nor does the Coalition explain why price competition is necessarily anti-competitive. The Commission understands that uniform pricing can have anti-competitive effects. It can, for example, facilitate coordinated pricing behavior.[45]

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39 LGC Comments at 32.

40 47 U.S.C. § 543 (l)(1)(D). See also Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996, 17 FCC Rcd. 7609, 7623-4 (2002) (rejecting NATOA's argument regarding FCC reconsideration of LEC potential service constituting effective competition, noting that "we examine several factors when making our determination as to whether a LEC offers service in a franchise area, including (but not solely restricted to) potential LEC service in the area."); Connecticut Department of Public Utility Control: Petition for Recertification of Rate Regulation Authority, DA 02-2693 (rel. Oct. 17, 2002) (rectifying LFA authority to regulate rates where LEC ceases to offer cable service).

41 As Comcast's Comments explain, competition from a large and powerful competitor "can have a competitive impact on a cable operator" even before the competitor "finishes installing its plant or rolling out its service." Comcast Comments at 41 n.123.

42 LGC Comments at 53.

43 Id. at 52.

44 Everest Midwest L.L.C. also commented on this issue. To the extent Everest raises arguments pending in complaint proceedings, those proceedings, rather than this rulemaking, are the proper locus for resolution.

45 See Application of EchoStar Communications Corporation, CS Docket No. 01-348 at ¶186 (Oct. 18, 2002).

If there is evidence that an operator is pricing predatorily, nothing precludes the competitor from bringing such a claim in a traditional antitrust forum. The Cable Act, however, does not provide a forum for FCC action entertaining predatory pricing complaints outside the limited context of MDU pricing.[46]

In any event, the FCC has made clear that it is keeping a close eye on overbuilders' allegations concerning operators' pricing practices. Recently, the Commission explained that "the Media Bureau and Enforcement Bureau currently are reviewing complaints by overbuilders concerning [cable operator pricing] practices. We will continue to monitor allegations of targeted pricing closely and address specific abuses on a case-by-case basis."[47] No additional action is warranted.

VI. BASIC RATE ADJUSTMENTS FOR CHANNEL ADDITIONS AND DELETIONS SHOULD BE GRANDFATHERED

LGC claims that the FCC has "fail[ed] to prevent evasions"[48] in determining the appropriate rate for channel additions to and deletions from the basic tier. But this unfair accusation mischaracterizes the actions of operators and the Commission. The FCC has acknowledged that significant confusion has surrounded the proper method for adjusting rates to account for channels added to or deleted from the basic tier. The Comments of Cox Communications, Inc. and Comcast Cable Communications, Inc. provide a "Historical Appendix," which chronicles why this confusion arose. Given the circumstances, it would be grossly unfair to follow the LGC's suggestion to require operators to modify their prior rate

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[46] 47 U.S.C. § 543(d)(exempting bulk discounts to MDUs from uniform pricing requirement, "except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit"); Armstrong Communications, 16 FCC Rcd. 1039, 1044 n. 34 (2001)(Section 623(d) and FCC's rules do "not provide for broader Commission review of allegations of predatory pricing").

[47] Applications for Consent to the Transfer of Control of Licenses From Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, MB Docket No. 02-70 (rel. Nov. 14, 2002) at ¶122.

filings to conform to whatever future rules that the FCC may adopt in this proceeding.[49] It is undoubtedly for this reason that the FCC recognized that permitting LFAs to reopen basic rate adjustments would lead to instability in the rate-setting process.[50]

Instead, the FCC should acknowledge that the confusion created warrants grandfathering rate calculations made for channel changes during this period. This is not only equitable; it also is the only solution that would avoid compounding the problems that lack of clarity caused. As Cablevision's Comments describe, "the proposed grandfathering approach represents a reasonable means of addressing channel addition/movement issue on an interim basis, and is an important step in preventing the build-up of a backlog of unresolved local rate orders."[51] Requiring rate recalculations for previous years will also increase regulatory costs on LFAs and operators – costs easily avoided by grandfathering as suggested in NCTA's Comments.

Furthermore, going forward, the FCC should not require operators to calculate rates using a residual, as suggested by the Coalition[52] and the N.J. BPU.[53] Cox Communications and Comcast's comments explain why the residual no longer makes sense.[54] Calculating the residual will be much more complicated than the cable industry's per-channel "mark-up" method. Resort to the per-channel table will eliminate the need for lengthy rate review and will simplify the rate calculation process without a significant impact on consumer rates.

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48 LGC Comments at 42.

49 LGC Comments at 44.

50 Notice at ¶55.

51 Cablevision Comments at 5.

52 LGC Comments at 44.

53 N.J. BPU Comments at 2.

54 Cox Communications Comments at 11; Comcast Comments at 23.

The cable industry's neutral proposal, in which rates decrease and increase by the same amount, also avoids the wholly unfair results that the N.J. BPU proposes. The BPU suggests that operators adding a channel would be entitled to no adjustment but in deleting a channel would be required to reduce rates on average 43 cents.[55] As described in NCTA's initial comments, this lopsided approach could lead to unreasonably low basic tier rates, particularly where a "fat" basic tier is divided into a basic and cable programming service (CPS) tier.

VII. THE FCC SHOULD NOT ADOPT THE CITIES' BURDENSOME EQUIPMENT RATE REGULATION PROPOSALS

LGC's Comments also take issue with the Commission's equipment aggregation rules. Currently, LFAs may review aggregated equipment filings on an annual basis. LGC suggests that certain operators may have frustrated these reviews. But their complaint is difficult to discern. While the Coalition seems to suggest that cities need access to all company records in order to verify that equipment rates have been calculated correctly on an aggregate basis, they also complain that they are getting too much information from the operators in support of their equipment filings.[56] To be sure, regulation of equipment rates is one of the most burdensome remaining aspects of rate regulation. But the cities' proposals would exacerbate, rather than alleviate, these burdens.

LGC first proposes to add another layer of regulatory oversight to equipment filings. It suggests that the Commission become involved in reviewing nationwide equipment rate filings.[57] But there are significant strings attached that turn what could be a simplified review into an

[55] N.J. BPU Comments at B.

[56] Compare LGC Comments at 46-47 (complaining about TCI's "sampling" methodology) with id. at 48-49 (complaining that TCI provided too much information).

[57] That solution – originally proposed by the cable industry – was rejected by the FCC when it initially adopted the aggregation rules. Report and Order, 11 FCC Rcd. 6778, 6790-92 (1996).

unworkable plan. In addition to FCC review, operators would still be subjected to LFA oversight of rate filings through, as LGC proposes, "mutual consultation with affected local communities or at the minimum a notice-and-comment process allowing input from franchising authorities and the public generally."[58] This multi-layered review process will simply lead to increased costs on cable operators.

The Coalition, though, has no apparent concern with the costs imposed by regulation. Indeed, its alternative approach to equipment regulation calls for "the cable operator who submits an aggregated filing to pay the cost of a third-party review of the filing and supporting data by an independent accounting firm, directed by the Commission, with input from local communities and the public as above."[59] The costs of local regulatory review are already borne by cable operators and their customers through franchise fees.[60] The FCC should not embrace the Coalition's arguments that operators should be forced to bear even more costs. Instead, it should streamline its rules to minimize those costs to the extent possible. Cablevision System's Comments propose one way to do so. Operators should be permitted to establish and maintain installation rates on a multi-year basis.[61]

The N.J. BPU urges the FCC to require operators to remove digital boxes from the calculation of equipment costs.[62] But the point of the equipment aggregation provision was to permit operators to include these more technically advanced boxes in a larger pool of converters

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58 LGC Comments at 50.

59 Id.

60 As Cox and Comcast's Comments detail, cities sometimes drag out basic rate reviews of equipment filings for years. In the case cited, the company was forced to spend four years litigating the case before the Commission. Comcast Comments at 52; Cox Comments at 28-29. As those comments explain, the FCC should take measures to ensure that LFAs comply with the Commission's remand orders in a timely fashion.

61 Cablevision Comments at 14-16.

62 N.J. BPU Comments at O.

in order to facilitate the roll-out of digital technology.[63] Requiring removal of these set-tops from any aggregated equipment pricing, as the N.J. BPU proposes, is thus impermissible under the Act. And as Cablevision System's comments explain, operators may have "digital box deployment and analog converter phase-out plans that are predicated on the Congressional decision to allow cable operators to blend digital and analog converter box costs into a single, aggregate regulated converter rate."[64] Changing the rules mid-stream could "jeopardize the ability of cable operators to recover their investment in digital technology."[65] Accordingly, the Commission should preserve operators' ability to blend digital and analog box costs into a single aggregate converter rate.

VIII. COMMERCIAL RATES SHOULD REMAIN UNREGULATED

Some LFAs seek to resurrect their arguments in favor of regulating commercial rates. For example, the Coalition asserts that the FCC must require operators to charge the same rates to commercial customers as they do to residential subscribers, at least until the FCC requires operators to show exactly how much more it costs them to serve commercial establishments.[66] And they propose that the FCC should entertain complaints regarding commercial rates.[67]

But the cable industry's comments showed that serving commercial accounts is fundamentally different from serving residential customers.[68] The costs of providing service to

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[63] H. Rep. No. 104-2047, 104th Cong. 1st Sess. 107-108 ("[c]able operators are permitted to aggregate equipment costs broadly. It is the Committee's belief that aggregating equipment costs into broad categories will enable cable operators to reduce the monthly charges to consumers that often are associated with the introduction of new technology.")

[64] Cablevision Comments at 13-14.

[65] Id.

[66] LGC Comments at 56.

[67] Id. at 57.

[68] NCTA Comments at 15-17; Comcast Comments at 31-34.

this class of subscribers can be substantially higher than serving residences. These costs include higher programming costs as well as differing cost structures for specialized installation. Commercial establishments also differ in the benefits that these customers derive from providing cable service in a commercial setting. They can and do use the availability of cable service as a way of attracting paying customers to their businesses.

The environment for serving commercial accounts, as described by cable operators' comments, is fiercely competitive.[69] As Comcast points out, "[c]ommercial establishments have access to at least three competitive distributors – cable, DBS, and SMATV – and cable operators must compete fiercely each and every day for commercial accounts with MVPDs that are not burdened with carriage obligations for PEG and leased access programming, which cable operators are required to carry but in which commercial establishments have no interest."[70]

Cost differences and competitive issues aside, there is no statutory authority to regulate commercial rates. That Congress did not encompass commercial customers in its rate regulation provision has been fully explained.[71] And the reasons why the FCC's initial benchmark rates did not reflect rates charged commercial establishments have also been fully briefed.[72]

The specific proposals for regulating commercial rates are without merit. Applying the benchmark rates to these businesses would confer a wholly unjustified windfall. And requiring

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69 Comcast Comments at 34. The Comments of the State of New Jersey Board of Public Utilities raise a concern about commercial establishments in urban areas. They argue that these businesses may be located in buildings without access to satellite providers. N.J. BPU comments at G. But the N.J. BPU does not show that prices for those particular commercial businesses differ from others in the community who do have these competitive alternatives. The N.J. BPU provides no evidence that these rates fluctuate based on the ease of erecting a satellite dish in a particular building.

70 Comcast Comments at 34.

71 Id. at 32-34.

72 See e.g., Comments of NCTA on the Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266 (filed June 29, 1994) at 17-18 (explaining that revenues from commercial establishments were not likely included by operators in completing the survey that formed the basis for the FCC's formulas).

operators to undertake a cost showing to justify commercial rates that differ from residential rates is simply a waste of time and resources. These sophisticated buyers of communications offerings are in no need of a new rate regulation scheme.

CONCLUSION

For the reasons stated herein and in NCTA's initial comments, the Commission should streamline and simplify its basic rate rules. It should avoid the cities' proposals to add new regulatory burdens and costs on operators and their customers.

Respectfully submitted,

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